An appeal

- by -

The Dear Animal Hospital Ltd.
(the “Employer”)

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR:	Ib S. Petersen
FILE No.:	2000/757
DATE OF HEARING:	February 16, 2001
DATE OF DECISION:	March 22, 2001

DECISION

APPEARANCES:

Dr. Michael Dear	on behalf of the Employer
Ms. Joan Carlin	on behalf of herself

OVERVIEW

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director of Employment Standards (the "Director") issued on October 16, 2000. The Determination against the Employer concluded that Carlin (the "Employee") did not quit her employment with the Employer and, in the result, was owed $5,282.03 on account of compensation for length of service.

FACTS AND ANALYSIS

The Determination found that Carlin worked for the Employer as a hospital manager from September 10, 1992 to October 6, 1999. She was paid $18.00 per hour and a $50.00 "bonus" based on a 40 hour work week.

At the hearing, Dr. Dear and Shirley Dear ("Dear") testified for the Employer and Carlin testified for herself. Dear testified that Carlin went off work in April 1999 and utilized her 15 weeks sick benefits under Employment Insurance. In July, Dear testified, she had a conversation with Carlin during which Carlin told her "I cannot see myself coming back to work and I am applying for LTD (long term disability benefits)." The dispute centres on whether Carlin quit her employment when she told the Employer that. Subsequently, the Employer terminated the Blue Cross plan for Carlin and, as well, made another employee hospital manager. Dear testified that she told the bookkeeper that Carlin had left her employment and the Employer would not continue with Blue Cross which was paid equally by the Employer and the Employee. The Employer made the premium payments for July and August and later requested re-payment from Carlin. Carlin's claim for benefits was ultimately declined by the insurance carrier in February 2000--and that is when, says the Employer, "problems seemed to start." The Employer agrees that Carlin kept in touch with and came to the hospital from time to time: she brought her pets in for treatment, she was asked about suppliers, and that she attended "inventory night" at the end of August--this was a "social thing." In short, The Employer says that Carlin resigned.

Carlin says that she was on sick leave and had no intention of resigning. Carlin explained that she took medical leave in April 1999 and went on EI. She applied for LTD benefits in July. She says that around July 15, 1999 she took the Blue Cross application forms for those benefits to Dr. Dear who signed them and dropped them off at her home at the end of July, on a Sunday. She

says that she did, in fact, pay the Blue Cross premiums for July and August. She paid by cheque and the cheque was cashed. Carlin says that she, in fact, did some work for the Employer during her leave. Because she had worked alone in her job, staff performing her duties needed training (Karen Groden, Dawn Abel and Mariana McLean, for example) with respect to ordering supplies, billing of clients and "closing" the computer at month's end. Over time, as one might expect, that work tapered off. She did come in to the work place on a "sporadic basis." She also explained that she came to the hospital in July and August to do the preparatory work for the year end, August 31. This happened "sometimes" after hours because she used the printer "in the front" which could not be used during office hours. On one occasion, August 15, she says that Dr. Dear was present, and talking to two clients, when she came to the hospital. On that occasion she completed the inventory printout and left with the some 40-50 pages. The night of the inventory--August 31--she arrived at approximately 6:30 p.m. and stayed for two hours. When the work was finished, she took it home to do the "reconciliation." On September 15, she went back to print out more documents related to this work. At that time, Dr. Dear and his (new) wife was also present and they gave her some "paperwork." She left after having chatted for a few minutes.

On October 4, 1999, Carlin received a statement from Blue Cross. She telephoned Dr. Dear to ask him why her coverage had been cancelled. According to Carlin, he said that he was "not aware" of this--and suggested that she best speak with Dear or Rietta Vanderweyer. He also indicated that he "would look into it." Subsequently, Carlin called Vanderweyer and Dear and left messages. She explained that the former returned her call and apologized for the cancellation of Blue Cross and told her that Dear had told her to do it "because of the financial constraints of the hospital." The next day, Dear called Carlin and "that's when it began that brought us here." Carlin stated that Dear told her that she "shouldn't expect the hospital to pay her benefits when she was no longer an employee." Carlin explained that she had a long conversation with Dear and that she asked what she meant. According to Carlin, Dear stated that she "shouldn't expect to hold her job." After the call, Carlin filed a complaint with the Employment Standards Branch. The fact that Blue Cross turned her down for disability benefits had nothing to do with the complaint. Subsequently, Carlin received a telephone call from Dawn Abel. Carlin explained that the Employer wanted her to return the Employer's Office Depot credit card. She returned the card, keys and the inventory printouts.

I agree with the delegate's conclusions. I do not agree with the delegate's comment that the "onus is on the employer to show that the employee quit." In my view, the onus is on the employee to establish that she was dismissed from her employment. I agree with the comments of Errico J. of the British Columbia Supreme Court in *Walker v. International Tele-Film Enterprises Ltd.*, <1994> B.C.J. No. 362 (February 18, 1994), at page 17-18:

> "The onus of proof is on Mr. Walker to prove that he was wrongfully dismissed. This is not a case where the defendant employer is raising justification. The issue is whether Mr. Walker left the company on his own volition or whether he was dismissed. Counsel for Mr. Walker cited a decision of the Nova Scotia Court of

> Appeal in *McInnes v. Ferguson*, (1900), N.S.R. p. 517. This decision holds that the onus lay on the employer where the issue was whether or not the employee left voluntarily, but there is no judicial discussion about it. I have considerable difficulty with this proposition which shifts the onus of proof to the defendant. This is a concern I share with Prowse J., as she then was, who in *Osachoff v. Interpac Packaging Systems Inc*., unreported, Vancouver Registry, April 21st 1992 C910344, discussed this decision and declined to follow it, as I do. In that case, as in this, the onus is on the plaintiff to establish on the balance that he was dismissed."

In this case, I find the facts set out above show that the employee was dismissed in October 1999.

I agree with the adjudicator's comments in *RTO (Rentown) Inc*., BCEST #D409/97, where he notes:

> "Both the common law courts and labour arbitrators have refused to rigidly hold an employee to their "resignation" when the resignation was given in the heat of argument. To be a valid and subsisting resignation, the employee must clearly have communicated, by word or deed, an intention to terminate their employment relationship and, further, that intention must have been confirmed by some subsequent conduct. In short, an "outside" observer must be satisfied that the resignation was freely and voluntarily and represented the employee's true intention at the time it was given."

In a nutshell the delegate's analysis reflected these principles. Carlin did not resign in July 1999. In this case, there was not even the statement "I quit." In my view, Carlin did not communicate "clearly by word or deed an intention to terminate" the employment relationship. At most, Carlin, in my view, expressed the expectation that she might not return to work due to her illness. Moreover, her subsequent conduct is consistent with that. As noted by the delegate, she was surprised to find that her Blue Cross coverage had been cancelled. I find her testimony in that regard believable. It is supported by evidence not in dispute (although I recognize that the parties characterize it differently), namely that Carlin assisted in the training of staff and that she participated in the year end inventory. If she was no longer an employee--why would she do this? In other words, I do not find that, even if she had expressed an intention, and I do not, that her subsequent conduct is consistent with such an intention. In my view, the Employer acted prematurely and on the--as it turned out erroneous--assumption that Carlin had resigned. The Employer could, in my view, simply have clarified if Carlin's intention was to resign. It did not do that.

In the result, I uphold the Determination.

ORDER

Pursuant to Section 115 of the Act, I order that Determination in this matter, dated October 8, 2000, be confirmed.

IB S. PETERSEN

Ib S. Petersen
Adjudicator
Employment Standards Tribunal